



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 4

ATLANTA FEDERAL CENTER  
61 FORSYTH STREET, SW  
ATLANTA, GEORGIA 30303-8960

March 01, 2022

Mr. Greg Young  
Deputy Commissioner  
Tennessee Department of Environment & Conservation  
William R. Snodgrass Tennessee Tower, 2nd Floor  
312 Rosa L. Parks Avenue  
Nashville, Tennessee 37243

RE: American Nuclear Corp. Site on Blockhouse Valley Road in Anderson County, Tennessee

Dear Mr. Young:

Thank you for having your General Counsel's office contact the U.S. Environmental Protection Agency on August 11, 2021, about the property on Blockhouse Valley Road in Anderson County, Tennessee, known as the American Nuclear Corp. Site ("Site"), which is owned by the State of Tennessee ("State"). In the inquiry, your counsel described the Tennessee Department of Environment & Conservation's (TDEC) interest in referring the Site to the EPA for evaluation, assessment or some other response action, and your counsel requested that the EPA provide the State with a determination whether the State would qualify for EPA enforcement discretion under the EPA guidance "Superfund Liability Protection for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018" (June 15, 2020) ("Local Government Guidance").<sup>1</sup>

The purposes of this comfort/status letter are to provide TDEC with information that may be relevant to the potential Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>2</sup> liability concerns you have identified at the Site and to summarize the relevant information available to the EPA about the Site as of the date of this letter. The EPA hopes this information will enable TDEC to make an informed decision about whether to refer the Site to the EPA. The EPA is providing this letter consistent with the Agency's 2019 Comfort/Status letter policy.<sup>3</sup>

**Information Provided by the State**

Contamination

The EPA has not conducted any independent investigation of conditions at the Site, but from the information TDEC provided, the EPA understands the following:

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<sup>1</sup> See *Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018*, (June 15, 2020), available on the Agency's website at <https://www.epa.gov/enforcement/guidance-superfund-liability-protections-local-government-acquisitions>.

<sup>2</sup> 42 U.S.C. §§ 9601, *et seq.*

<sup>3</sup> See 2019 Policy on the Issuance of Superfund Comfort/Status Letters available on the EPA's website at <https://www.epa.gov/enforcement/comfortstatus-letters-guidance>.

- The Site is contaminated with radioactive materials that may include Co-60 (cobalt), Cs-137 (Cesium), Sr-90 (Strontium 90) and other potential radionuclides resulting from the operations of the American Nuclear Corporation from 1962 until around 1970;
- The TDEC Division of Radiological Health has secured the Site with a perimeter fence;
- The annual dose potential at the fence line to a member of the public is less than 100 millirem, which is the allowable limit under state regulations; and
- The Site is actively monitored by the TDEC Division of Radiological Health, which:
  - takes survey readings inside and outside the perimeter fence each month;
  - samples the on-Site spring each month;
  - samples the downstream Braden Branch Creek each quarter;
  - analyzes passive dosimeters around perimeter points and near the hot cell building each quarter;
  - conducts a grid survey annually; and
  - samples the sediment annually.

### Ownership

From the information TDEC provided, the EPA understands the following:

- The Site is owned by the State.
- The State first acquired the parcel known as Area B-2, which encompasses a building containing a “hot cell” and a mounded area where radioactive debris has been buried.
  - In 1977, the Governor granted a request from the Commissioner of the Tennessee Department of Public Health to condemn the Site.<sup>4</sup>
  - That same year, the State reached a settlement agreement with the Site owner to acquire Area B-2 and to place use restrictions on the remainder of the Site.
  - “Condemnation” is the process by which the State’s public agencies exercise eminent domain authority.<sup>5</sup>
  - The State acquired Area B-2 via quitclaim deed on July 28, 1980.<sup>6</sup>
- The State acquired the remainder of the Site after documenting several violations of the use restrictions by successive owners.
  - In 1986, the Division of Radiological Health within TDEC’s predecessor agency asked the State Attorney General to begin the process of acquiring the remainder of the Site according to a section of State law that allows the State to accept voluntary contributions of property contaminated by radioactive materials for the purpose of protecting the public health.<sup>7</sup>

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<sup>4</sup> See letter from Eugene W. Fowinkle, M.D., Commissioner of the Tennessee Department of Public Health, to Ray Blanton, Governor of the State of Tennessee (December 2, 1976), and letter from Ray Blanton, Governor of the State of Tennessee, to Eugene W. Fowinkle, M.D., Commissioner of the Tennessee Department of Public Health (January 12, 1977).

<sup>5</sup> See Section 29-17-104 of the Tennessee Code Annotated, T.C.A. §29-17-104.

<sup>6</sup> Anderson County Register of Deeds, Book C-15 at Page 006

<sup>7</sup> See Part 4 (Restoration of Facilities) of Chapter 202 (Atomic Energy and Nuclear Materials) of Title 68 (Health, Safety and Environmental Protection) of the Tennessee Code Annotated.

- The State acquired the remainder of the Site via warranty deed on January 30, 1987.<sup>8</sup> The deed expressly refers to the State law providing the authority mentioned above allowing the State to accept voluntary contributions of property contaminated by radioactive materials for the purpose of protecting public health.

The EPA understands that you are interested in information regarding the state and local government liability protections provided by CERCLA. This letter discusses two liability protections that may apply to your situation: the third-party and innocent landowner defenses; and the new state and local government acquisition exemptions provided by CERCLA § 101(20)(D).

### **Third-Party and Innocent-Landowner Defenses**

CERCLA § 107(b)(3) provides a “third-party” affirmative defense to CERCLA liability for any owner, including a local government, that can prove, by a preponderance of the evidence, that the contamination was caused solely by an act or omission of a third party whose act or omission did not occur “in connection with a contractual relationship.” An entity asserting a CERCLA § 107(b)(3) defense also must show that it exercised due care with respect to contamination and that it took precautions against foreseeable acts or omissions, and the consequence thereof, by the third party that caused the contamination.

CERCLA’s third-party defense includes an “innocent-landowner defense” as an exclusion to the definition of “contractual relationship” in Section 101(35). The “innocent-landowner defense” applies to entities that meet the criteria set forth in CERCLA § 101(35) and 107(b)(3). A “contractual relationship” under CERCLA § 101(35)(A) does not include the scenario where “the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.” CERCLA § 101(35)(A)(ii) provides an additional liability protection through an affirmative defense for these types of acquisitions, provided other requirements, including the exercise of due care, are satisfied.

### **CERCLA § 101(20)(D) State and Local Government Liability Exemption**

In 2018, Congress enacted the Brownfields Utilization, Investment, and Local Development Act of 2018 (BUILD Act).<sup>9</sup> CERCLA § 101(20)(D), as amended by the BUILD Act, provides liability protection to local governments<sup>10</sup> that may exempt them under certain circumstances from being an “owner” or “operator” and thus may protect them from potential CERCLA liability.

The BUILD Act amended CERCLA § 101(20)(D) to add a new category of exempt acquisitions, “through seizure or otherwise in connection with law enforcement activity” and to remove the requirement that state and local governments must acquire title to property “involuntarily.” CERCLA § 101(20)(D) now states that a “unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government

<sup>8</sup> Anderson County Register of Deeds, Book R-16 at Page 856

<sup>9</sup> Brownfields Utilization, Investment, and Local Development Act of 2018, Division N of Pub. L. No. 115-141, 132 Stat. 1052 (March 23, 2018).

<sup>10</sup> Many of the references to “local governments” in this letter and to CERCLA’s liability protections are also applicable to state governments.

acquires title by virtue of its function as sovereign” is exempt from the definition of “owner or operator” if that government entity did not cause or contribute to the release or threatened release of a hazardous substance from the facility. Please note some actions or omissions during ownership (such as dispersing contaminated soil during excavation and grading and failing to prevent the release of hazardous substances) may cause or contribute to a release of hazardous substances from a property and make the local government ineligible for the exemption.<sup>11</sup>

Courts, not the EPA, are the final arbiter of whether a party has achieved a liability protection. Thus, the EPA recommends you consult your legal counsel to assess whether the State’s circumstances satisfy each of the statutory requirements necessary to achieve and maintain either the state and local government liability exemption or the third-party/innocent landowner defense.

### **Enforcement Discretion Under the Local Government Guidance**

On June 15, 2020, the EPA issued the Local Government Guidance, which describes the Agency’s enforcement discretion policies that may apply to state and local governments and to your situation. The guidance provides:

The CERCLA § 101(20)(D) exemption from owner or operator liability includes circumstances in which a local government acquires title to property “by virtue of its function as sovereign.” This phrase is undefined in the statute. To provide clarity to local governments, the EPA generally intends to exercise its enforcement discretion to treat a local government acquisition as “by virtue of its function as sovereign” only when the government acquires title to the property by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body.

The Local Government Guidance goes on to say:

CERCLA § 101(20)(D) does not address the exercise of eminent domain authority. The EPA generally intends to exercise its enforcement discretion to treat the exercise of eminent domain authority for a public use as an acquisition of title “by virtue of its function of sovereign” under Section 101(20)(D).

The EPA’s policy prohibits the Agency from offering conclusive statements about whether the EPA will take enforcement action in any particular situation.<sup>12</sup> However, from the information provided by TDEC, the EPA recognizes that the authority used by the State to acquire Area B-2 of the Site is the State’s eminent domain authority. Furthermore, the EPA recognizes that the authority under which the State acquired the remainder of the Site is a uniquely governmental authority and that it was exercised to protect the public health, safety or welfare at a site contaminated with radioactive materials.

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<sup>11</sup> For additional discussion of post-acquisition activities that may or may not be considered releases under CERCLA, see the disposal discussion beginning on page 8 of the EPA’s *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements Guidance”), July 29, 2019, available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>.

<sup>12</sup> “Policy Against ‘No Action’ Assurances,” November 16, 1984, available on the Agency’s website at <https://www.epa.gov/sites/default/files/2013-10/documents/noactionass-mem.pdf>.

## Conclusion

The EPA remains dedicated to facilitating the cleanup and beneficial reuse of contaminated properties and hopes the information contained in this letter is useful to TDEC. You may find it helpful to further consult your own environmental professionals and legal counsel before taking any action to refer the Site to the EPA. Such consultations may help you obtain a greater level of comfort about the applicability of federal, state, local and/or tribal laws or requirements. If you have any additional questions or wish to discuss this information further, please feel free to contact Stacey Haire, Senior Attorney, at (404) 562-9676 or [haire.stacey@epa.gov](mailto:haire.stacey@epa.gov).

Sincerely,

Maurice L. Horsey, IV, Chief  
Enforcement Branch  
Superfund & Emergency Management Division

cc: Matthew Sander, EPA Office of Site Remediation Enforcement  
Elisabeth Freed, EPA Office of Site Remediation Enforcement